Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information;	)	CC Docket No. 96-115
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	CC Docket No. 00-257

REPLY OF THE
ARIZONA CORPORATION COMMISSION
TO OPPOSITIONS TO ITS PETITION FOR
CLARIFICATION AND/OR RECONSIDERATION

I. Introduction

The Arizona Corporation Commission ("ACC" or "Arizona Commission") filed a Petition for Clarification and/or Reconsideration on a narrow issue involving the dissemination of Customer Proprietary Network Information ("CPNI") to unaffiliated third-parties by carriers discussed in the Federal Communications Commission's ("FCC" or "Commission") recent Third Report and Order.[1] Oppositions to or Comments on the

[1] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket Nos. 96-115, 96-149, Third Report and Order and Third Further Notice of Proposed Rulemaking, FCC 93-27 (rel. Feb. 26, 1998)(Third Report and Order).

ACC's Petition for Clarification were recently filed by WorldCom, Inc. ("WorldCom"), AT&T Corporation ("AT&T"), Qwest Services Corporation ("Qwest"), and Sprint Corporation ("Sprint"). Following is the ACC's Reply to the Oppositions and Comments filed on its Petition.

II. Discussion

A. The Commission Should Clarify That Its Rules Do Not Permit Disclosure of Individual CPNI to Unaffiliated Third-Parties by the Underlying Carrier Unless the Customer Expressly Authorizes Disclosure Under 47 U.S.C. 222(c)(2).

The Arizona Commission sought clarification and/or reconsideration of a narrow point involving the dissemination of CPNI to unaffiliated third-parties in its Petition filed on October 21, 2002. While the ACC believes that the FCC does not intend for carriers to be able to release CPNI to any unaffiliated third-party, even under an opt-in approval mechanism, this is not entirely clear from the FCC's Order or Rules. Therefore, the ACC seeks clarification by the FCC that its Rules do not permit carrier dissemination of individually identifiable CPNI to unrelated third-parties, even under an opt-in approval mechanism. The ACC is using the term "unrelated" or "unaffiliated" to mean third-parties, **other than** affiliates of the carrier, or its agents, independent contractors and joint venture partners that market and provide communications-related services or its affiliates that market and provide non-communications related services.

The ACC is concerned that unless the Commission clarifies that disclosures to unrelated or unaffiliated third-parties is only allowed under 47 U.S.C. Section 222(c)(2), unintended and inappropriate dissemination may result in some instances. The problem in such cases is that it would be virtually impossible for the carrier to give adequate notice of such releases beforehand. Any notice would clearly be ineffective since it would be impossible in the notice to identify unrelated third-parties with any degree of

specificity and to further identify how the CPNI would be used by such third-parties with any degree of specificity.

In clarifying this narrow point, the FCC would be merely setting forth what the ACC believes is now standard industry practice. The record in Arizona establishes that carriers do not release CPNI to any unaffiliated third-parties (other than agents for marketing purposes) absent a court order and have no intention of doing so. This is also consistent with the FCC's acknowledgement in its Third Report and Order at para. 50 that carriers have not asserted any intention of sharing CPNI with unaffiliated third parties.

Several parties, including Sprint and AT&T, have misunderstood the ACC's Petition and the narrow issue on which the ACC is seeking clarification. Unfortunately, the ACC's use of the term "unrelated" third-party seems to have generated some of the confusion. Sprint apparently believes the ACC is asking for reversal of the Commission's decision to allow carriers to share their customers' CPNI with the carrier's agents, independent contractors and joint venture partners providing communications-related services, subject to certain safeguards. See Sprint Comments at p. 6. As already explained, this is not the case.

AT&T believes that the ACC is requesting that all CPNI disclosures be impermissible absent "express written authorization." AT&T Comments at p. 13. As explained herein, this is not the ACC's position and in fact misrepresents the ACC's Petition and goes far beyond the narrow issue on which the ACC is actually seeking clarification. Indeed, the ACC has not responded to many of AT&T's specific arguments since AT&T has misconstrued the ACC's Petition.

Several carriers argue that the Commission's rules already provide adequate safeguards. See, e.g., Comments of Sprint, Qwest and WorldCom. WorldCom and Qwest argue that the ACC's Petition should be denied because the Commission's rules in their current form do not allow for unlimited release of CPNI to any unrelated third-party.

See WorldCom Comments at p. 7; and Qwest Comments at p. 4. WorldCom states that newly adopted 47 C.F.R. Section 64.2008 expressly states that the notification required under both opt-in and opt-out "must specify the types of information that constitute CPNI and the specific entities that will receive the CPNI, describe the purposes for which CPNI will be used, and inform the customer of his or her right to disapprove those uses, and deny or withdraw access to CPNI at any time." Sprint similarly argues that if the carrier does not adequately disclose the identities of the parties to whom the carrier intends to disclose the customer's CPNI, the customer need not give his or her opt-in consent. See Comments of Sprint at p. 6.

The problem with WorldCom's argument is that it has been the ACC's experience in Arizona that many carriers' notices have been confusing in the past, have been inappropriately combined with other notices such that the importance of the CPNI notice was obscured, and have not conveyed sufficient information on CPNI dissemination. The ACC anticipates that carriers, in such cases, are nonetheless likely to argue that their notice, no matter how confusing and inadequate, was sufficient to inform the customer that dissemination to an unrelated third-party would be made. The problem with Sprint's argument is that if the carrier notice is confusing or unclear, the customer may not understand that he has reason to object or not to give his or her consent.

To avoid these problems, the ACC would recommend the following clarification to 47 C.F.R. Section 64.2007(b)(3):

> (3) Except for use and disclosure of CPNI that is permitted without customer approval under section 64.2005, or that is described in paragraph (b)(1) of this section, or as otherwise provided in section 222 of the Communications Act of 1934, as amended, a telecommunications carrier may, subject to opt-in approval only, use, disclose, or permit access to its customer's individually identifiable CPNI for marketing purposes, <u>to its affiliates that provide non-communications-related services subject to the same safeguards set forth in 47 C.F.R. Section 64.2007(b)(2)</u>.[2]

[2] 47 C.F.R. Section 64.2007(b)(2) requires use of a confidentiality agreement.

(4) Except for use and disclosure of CPNI that is permitted without customer approval under section 64.2005, or that is described in paragraphs (b)(1) and (b)(3) of this section, or as otherwise provided in section 222 of the Communications Act of 1934, as amended, a carrier may not disclose individually identifiable CPNI except in accordance with 47 U.S.C. Section 222(c)(2) or compulsion of law.

The ACC believes that the above clarification to the FCC's rules would go a long way in ensuring that no harmful or unintended disclosure of individually identifiable CPNI to unaffiliated third-parties occurs.

B. The Commission Should Reject the Arguments of A Few Carriers In Favor of Preemption of Inconsistent State CPNI Regulations.

AT&T also took issue with the ACC's support of the FCC's decision not to presumptively preempt inconsistent State CPNI rules, saying that the ACC failed to offer any argumentation or support whatsoever for the FCC's position. AT&T Comments at p. 13. Other parties also filed comments supporting the Petitions for Reconsideration filed by Verizon and AT&T Wireless both of which requested reconsideration of the FCC's decision to remove the presumption of preemption of inconsistent State CPNI regulations.

AT&T argues that the Commission's failure to presumptively preempt State CPNI regulations negates Congress's objectives and the Commission's own policy choices. AT&T Comments at p. 2. AT&T also argues that the Commission is effectively negating its regulation of interstate services and violating the First Amendment. Id. AT&T also states that there is no valid reason for the Commission to relinquish its Congressionally delegated responsibility to establish national CPNI rules, and thus it should preempt presumptively all inconsistent state regulations. AT&T Comments at pps. 2-3. AT&T's arguments are misplaced.

The FCC has adopted national rules to the extent required by the Federal Act. Nothing in the Act requires the FCC to preempt inconsistent State rules that are more stringent than the FCC rules in some regards. Indeed, if other consumer protection rules

adopted by the FCC are any indication, the FCC has traditionally allowed States to go beyond what it does at the Federal level to address any unique needs and consumer interests in their States. For instance, the FCC's slamming rules permit States to go beyond the national framework adopted by the FCC, and allows States to adopt more stringent slamming rules. There is no reason not to do the same with regard to CPNI. Varying CPNI rules no more impede a carriers' ability to operate on a multi-state or nationwide basis, than do other state specific consumer protection rules. National and regional carriers have long been aware that regulatory policies may vary on a State by State basis and that this is merely a cost of doing business. Simply because several States may adopt more stringent rules than the FCC, there is no requirement that the carrier adopt those State specific standards as part of its national CPNI policy.

Moreover the arguments offered by the carriers in support of opt-out at the Federal level are not necessarily borne out by the records at the State level. For instance, AT&T argues that under opt-out, customer inertia will not create a barrier to the flow of useful information. AT&T Comments at p. 3. This implies that an opt-in approval mechanism creates a barrier to the flow of useful information. However, in Arizona, AT&T filed comments which indicated that they use "opt-in" now on a nationwide basis and that using an oral opt-in approval mechanism, 85% of its customers said "yes" to release of their CPNI for marketing purposes. This is almost as high as some carrier results under "opt-out"; and the customers' consent is "informed and knowing", as opposed to "implied" in many cases. This demonstrates that opt-in approval does not have to create a barrier to the flow of useful information.

Both Verizon's and AT&T's arguments regarding the jurisdictionally mixed nature of CPNI and the inability to separate interstate and intrastate services as thwarting the FCC's interstate policies are also misplaced. These arguments fail to take into account the fact that the FCC rules allow for the use of either an "opt-in" or "opt-out"

approval mechanism by carriers for intra-company dissemination of CPNI for communications-related marketing purposes.

The Commission should also reject the attempt by several carriers to portray the Commission's new policy as an "abrupt" departure from its earlier position. It is not. The FCC's position is actually more consistent with its position on State authority in other important consumer protection areas. For instance, in its Third Report and Order, the FCC recognized that with other consumer protection rules, it has allowed States to go beyond what it required and adopt more stringent rules at the State level. Moreover, in its Second Report and Order[3], the FCC did not outright preempt inconsistent State CPNI rules. Rather it established a presumption that inconsistent State rules would be vulnerable to preemption but preemption could only occur after a review by the FCC of the objectionable State rules on a case-by-case basis. Elimination of the presumption is actually consistent with the FCC's position to adopt an "opt-out" approval mechanism for intra-company dissemination of CPNI; since some State records may support "opt-in" in such cases.

The Commission should also reject arguments that the Commission, by failing to presumptively preempt State CPNI regulations, is inviting States to infringe carriers' First Amendment rights.[4] These arguments prejudge the records at State commissions before they are even created. These same carriers go on to argue that the State could not possibly develop a more comprehensive record than that developed at the FCC. These arguments do not take into account the fact that State records are developed oftentimes using processes which vary considerably from the processes employed by the FCC to

[3] See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998).

[4] AT&T Wireless goes so far as to suggest that "[b]ecause opt-out is the only approval mechanism consistent with the First Amendment, and because the record in this proceeding has twice confirmed that fact, neither the Commission nor the states can impose more stringent requirements. See AT&T Wireless at 2.

develop its records. For instance, State commissions and their Staffs oftentimes utilize discovery, hearings, and workshops to build their records. The Arizona Commission has held several CPNI workshops and/or Open Meetings during which the comments of carriers and Arizona consumers were solicited. The Arizona Staff has solicited several rounds of comments and has also promulgated at least one round of discovery to Arizona carriers participating in its proceeding. Any rules that the ACC adopts will be noticed, workshops will be held, additional discovery conducted, and all parties will have ample opportunity to comment and have their positions heard. Consequently, contrary to the arguments of some parties, the processes at the State level may actually result in a more comprehensive record and one likely to be more focused on issues which may be unique to that particular State. State regulators are best suited to deal with the particular problems faced by consumers in their States and structure any necessary added privacy protections to address those concerns.

Finally, the Commission should also reject the positions of those parties which urge the Commission to go far beyond its past preemption policies. For instance, SBC and Verizon both argue that the Commission should outright preempt inconsistent State rules that require carriers to obtain opt-in approval for intra-company use of CPNI. SBC argues that the request by Verizon is specific and self-explanatory, rendering Commission review of any state-specific opt-in requirement wholly unnecessary. This goes far beyond the presumption adopted by the Commission in its Second Report and Order, and is simply unjustified. In addition, the FCC's action in doing away with the presumption appropriately recognizes that more stringent requirements may be appropriate in some States based upon the records developed.

III. Conclusion

The ACC respectfully requests that the FCC clarify its Third Report and Order to the extent requested herein, and that the FCC reject the arguments of parties opposing the

ACC's request for clarification. The ACC also respectfully requests that the FCC deny the petitions for reconsideration filed by Verizon and AT&T Wireless.

RESPECTFULLY submitted this 23rd day of January, 2003.

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